

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

LUIS ALZATE

v.

Civil Action No. 93-0053-T

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

Ernest C. Torres, United States District Judge.

In the fall of 1988, Luis Alzate was indicted for possession of cocaine with intent to distribute. Attorney Allen E. Kudisch agreed to represent Alzate through trial for a fee of \$25,000.00. After paying \$10,000.00 of Kudisch's fee in advance, Alzate decided to retain Attorney John F. Cicilline as trial counsel. Alzate was convicted and, on May 11, 1989, was sentenced to 78 months in prison. Cicilline filed notice of appeal, but Alzate elected to have Kudisch represent him on appeal.

Alzate and Kudisch have different versions of the fee agreement between them. According to Kudisch, his fee for prosecuting the appeal was to be \$15,000.00 in addition to the \$10,000.00 previously paid, and the entire balance was to be paid in advance. According to Alzate, the additional amount payable to Kudisch was to be only \$8,000.00. The discrepancy is not significant because both agree that the balance was never paid in full.

In June, 1989, Kudisch received \$2,500.00 from Alzate's family. On June 20 he filed a motion with the First Circuit Court of Appeals to be admitted pro hac vice in connection with Alzate's

appeal and, also, to extend the time for filing the record and appellant's brief. The First Circuit extended those dates to July 21 and August 21 respectively but took no action on Kudisch's motion to be admitted pro hac vice. Accordingly, the Court continued to send all notices to Cicilline as counsel of record.

On September 27, Cicilline forwarded to Kudisch a communication from the Court of Appeals indicating that Alzate was in default because he had not filed a brief, had not forwarded the record and had failed to pay the docket fee. Kudisch advised Cicilline that he would not request any further extensions because his fee had not been paid. As a result, a default order was entered on October 11. Upon entry of default, Kudisch advised Alzate's family that he thought the default could be vacated but that he would not do anything further unless the balance of his fee was paid, in full.

On October 21, Alzate's relatives tendered an additional \$1,500.00. Kudisch accepted the payment but took no action. Shortly thereafter Alzate learned of the default and wrote to Kudisch expressing his concern about the status of his appeal. Kudisch wrote back that, because he had not been paid, he had decided not to "continue" representing Alzate. However, he further stated that he would not notify the Court of his decision pending Alzate's response. A few days later Alzate's relatives paid Kudisch an additional \$1,000.00, but Kudisch still took no action.

On January 11, 1990, Alzate, again, wrote to Kudisch expressing concern that his appeal would be dismissed due to

Kudisch's inaction and offering to "make arrangements to guarantee the remaining balance" of Kudisch's fee in order to avoid losing the right to appeal. In his letter, Alzate stated, "please, write me and let me know whether you intend to file my appeal, if not, are you going to withdraw from my case, and if you are, will you request that an attorney be appointed to appeal my conviction." Kudisch responded by telling Alzate to get another attorney. It is not clear when Kudisch conveyed that message to Alzate. However, it was not until late 1990 that Kudisch turned over the trial record to Alzate's relatives and agreed to refund \$8,000.00 of the amount previously paid to him.

On January 4, 1991, Alzate filed his initial § 2255 petition alleging various errors in the conduct of his trial. That petition was denied. However, as a result of a subsequent § 2255 petition alleging loss of appeal rights, this Court directed that an evidentiary hearing be held to determine whether Alzate had waived those rights. United States v. Luis Alzate, 833 F. Supp. 90 (D.R.I. 1993).

DISCUSSION

Based on the foregoing facts, the Court concludes that Alzate did not expressly or impliedly waive his right to appeal. Alzate consistently expressed to counsel his desire that his conviction be appealed. He reinforced those expressions by arranging to have several thousand dollars delivered to Kudisch as partial payment of Kudisch's fee.

Moreover, under the circumstances, Alzate had reasonable grounds to believe that Kudisch was representing him and would take the steps necessary to, at least, perfect an appeal. Kudisch never told Alzate that he had not entered an appearance on Alzate's behalf. In fact as already noted, in June, 1989, Kudisch filed a motion seeking to appear pro hac vice. Furthermore, Kudisch's December 7 letter to Alzate refers to previous discussions in which Kudisch advised Alzate that he would not "complete" work on Alzate's appeal unless paid in full and states that Kudisch had decided not to "continue" to represent Alzate with respect to his appeal. Consequently, it was reasonable for Alzate to assume that Kudisch had been representing him.

It was equally reasonable for Alzate to believe that, as his counsel, Kudisch would not abandon Alzate's appeal even though there was an outstanding balance due on Kudisch's fee. As already noted, Kudisch received at least \$15,000.00 from Alzate. Furthermore, although Kudisch stated on several occasions that he would do nothing further until paid in full, he continued accepting installment payments until December, 1989, and did not definitively terminate his representation until after Alzate's appeal had been dismissed.

That is not to say that Alzate is blameless for the failure to perfect his appeal. He participated with Kudisch in what amounted to a game of "chicken." Kudisch apparently believed that, when threatened with the loss of his appeal, Alzate would pay the balance of Kudisch's fee as originally agreed. Alzate, on the

other hand, apparently believed that Kudisch's obligations as his counsel coupled with partial payments and promises of future payments would induce Kudisch to follow through on the appeal. Although Alzate miscalculated, his conduct falls short of anything that could be characterized as a waiver of his right to appeal.

CONCLUSION

For all of the foregoing reasons, Alzate's \$ 2255 petition is granted to the extent that Alzate's sentence will be set aside and he will be resentenced so as to enable him to perfect an appeal. See, Bonneau v. United States, 961 F.2d 17, 22 (1st Cir. 1992).

IT IS SO ORDERED.

ERNEST C. TORRES
UNITED STATES DISTRICT JUDGE

April ___, 1994